AND BRIEFS

Supreme Court, U.S.
FILED
OCT 30 2017
OFFICE OF THE CLERK

No. 16-111

IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the
Colorado Court of Appeals

BRIEF OF *AMICI CURIAE* 15 FAITH AND CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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October 30, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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STATEMENT OF INTEREST

The issue in this case is whether a commercial bakery that operates as a place of public accommodation under Colorado's anti-discrimination law, Colo. Rev. Stat. § 24-34-601, may use a religious or free speech justification for avoiding compliance with the state's anti-discrimination law.[1] Amici strongly urge the Court to answer that question no.

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than amici curiae, their members, or counsel made any monetary

Amici are civil rights groups, religious institutions, and grassroots organizations that are committed to fighting religiously motivated discrimination, including requests for overly-broad religious exemptions from generally applicable anti-discrimination laws. There can be no dispute that anti-discrimination laws have long played a crucial role in protecting the rights of religious minorities. Petitioners' requested exemption will dramatically limit—if not completely eliminate—that protection. Petitioners are a private business—a bakery engaged in sales to the public—and its owner. They refused to sell a wedding cake to Respondents Charlie Craig and David Mullins because of their sexual orientation. Pet. App. 64a-65a.

A ruling that provides a religious or speech-based exemption from compliance with anti-discrimination laws would undermine one of the nation's core values: that no one should suffer discrimination because of their religious identity or beliefs. Such a ruling would thereby risk devastating negative consequences for people of faith, and especially for religious minorities. Amici and their members urge the Court to reaffirm the equality-enhancing values that underlay its interpretation of the scope and meaning of the religious liberty protections contained in the First Amendment.

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contribution intended to fund the preparation or submission of this brief. The consent of petitioners and respondent Colorado Civil Rights Commission is on file with the Clerk. Counsel for respondents Craig and Mullins consented to the filing of this brief; their consent accompanies the brief.

Rather than presenting a conflict between religious liberty rights and secular equality rights, amici consider petitioners' position to threaten religious liberty itself, insofar as religious minorities, including LGBTQ people of faith, stand to lose significant protections that guarantee their right to practice their faith free from discrimination.

Muslim Advocates is a national legal advocacy and educational organization working on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life. The issues at stake in this case directly relate to Muslim Advocates' work fighting for civil rights protections for American Muslim communities.

Columbia Law School's Public Rights/Private Conscience Project (PRPCP) brings legal, policy, and academic expertise to bear on the multiple contexts in which religious liberty rights may be in tension with other fundamental rights to equality and liberty. PRPCP undertakes approaches to the developing law of religion that both respect the importance of religious liberty and recognize the ways in which too broad an accommodation of these rights threatens Establishment Clause violations and can unsettle a reasoned harmony among competing fundamental rights.

Advocates for Youth is a nonprofit organization that helps young people make informed and respon-

sible decisions about their sexual and reproductive health and rights. Advocates for Youth's Muslim youth Leadership Council (MyLC) brings together Muslim-identifying young people in the United States to advance programming and policies related to LGBTQ health and rights, immigrant rights, racial justice, and sexual and reproductive health and rights. The issues in this case directly relate to MyLC's work fighting against Islamophobia and for those individuals living at the intersection of being proudly LGBTQ and Muslim.

The American Humanist Association (AHA) is a national nonprofit organization, with approximately 200 chapters and affiliates across the United States, committed to advocating for progressive values and equality for humanists, atheists, and freethinkers. AHA is committed to equal rights for religious minorities; the development of law and public policy based on reason and science, not theological claims grounded in supernatural belief; and opposing discrimination against individuals based on sexual orientation. Humanists recognize and support the notion of religious freedom while also believing that laws and policy must be guided by reason, empiricism, and a respect for personal autonomy, not by the religious beliefs of any particular segment of the population.

Asian Americans Advancing Justice | AAJC (Advancing Justice | AAJC) is a national nonprofit organization working to advance and protect civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. Advancing Justice | AAJC is one of the nation's leading experts on issues of importance to the Asian Ameri-

can community, including immigration and immigrants' rights. Advancing Justice|AAJC works to promote justice and bring national and local constituencies together through community outreach, public policy advocacy, and litigation.

The Capital Area Muslim Bar Association (CAMBA) is a voluntary bar association with a diverse membership. CAMBA's mission includes fostering a sense of fellowship amongst diverse Muslim legal professionals and amplifying their collective voice to impact legal issues affecting the Muslim community. CAMBA's objectives include addressing legal issues affecting the community at large and their related impact on the Muslim American community, and educating and advocating for constitutional, civil, and human rights for all persons.

DignityUSA is the national organization of Catholics committed to justice, equality, and full inclusion of LGBTQI people in our church and society. DignityUSA fully supports the right of people of all genders and sexual orientations to marry the person they love, and to have equal access to services provided by businesses, nonprofit groups, and government organizations. Like the majority of Catholics in this country, DignityUSA supports these rights for LGBTQI people even though the leadership of the Church does not.

Interfaith Alliance Foundation is a nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Interfaith Alliance Foundation's members belong to 75 faith traditions

as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom safeguards the rights of all Americans and is not misused to favor the rights of some over others.

The Muslim Alliance for Sexual and Gender Diversity (MASGD) is a national collective of Muslims who identify as lesbian, gay, bisexual, transgender, and queer. MASGD advocates and organizes with and for those who sit at the intersectionality of being both LGBTQ and Muslim in the United States. MASGD supports this amicus brief because the case's outcome will have magnified repercussions on this vulnerable minority in the wake of Islamophobia and homophobia.

The Muslim Public Affairs Council (MPAC) is a national public affairs nonprofit organization working to promote and strengthen American pluralism by increasing understanding and improving policies that impact American Muslims. MPAC supports the right to free belief and expression for people of all faiths or no faith, holds that compulsion of any religion is antithetical to our values, and supports policies that keep affairs of the state separate from the influence of religious ideologies.

The National LGBT Bar Association (LGBT Bar) is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students, and affiliated legal organizations supportive of LGBT rights. The LGBT Bar and its members promote equality for all people regardless of sexual orientation or gender identity or expression, and serve in their roles as lawyers to fight discrimination against LGBT people where it continues to exist.

The New Jersey Muslim Lawyers Association, like our forefathers, believes that no one should face discriminatory animus for their beliefs. A religion or speech-based exemption from compliance with anti-discrimination law would directly undermine that exact core American value, and would be catastrophic for those exercising their faith, especially religious minorities.

The Sikh American Legal Defense and Education Fund's (SALDEF) mission is to empower Sikh Americans by building dialogue, deepening understanding, promoting civic and political participation, and upholding social justice and religious freedoms for all Americans. SALDEF has a strong and direct interest in this case because it implicates the rights of Sikh Americans and other adherents of non-Abrahamic religions—a minority in America—whose beliefs and practices are not always understood by Americans.

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Since its inception on September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism. The Sikh Coalition joins this brief out of the belief that anti-discrimination laws are indispensable safeguards for religious, ethnic, and other minority communities.

T'ruah: The Rabbinic Call for Human Rights brings together rabbis and cantors from all streams of Judaism with all members of the Jewish community

to act on the Jewish imperative to respect and advance the human rights of all people. T'ruah trains and mobilizes a network of 1,800 rabbis and cantors and their communities to bring Jewish values to life through strategic and meaningful action. As members of a religious minority, T'ruah supports this brief because it believes petitioners' position, rather than protecting religious freedom, will only serve to restrict it.

SUMMARY OF ARGUMENT

Public accommodation laws are essential to protecting against religiously motivated discrimination. Any exemption from these laws, especially one as far-reaching as the one requested by petitioners, risks causing serious harm to the religious minorities who rely on these laws to safeguard their right to equal protection under the law.

The two fundamental rights of equality and religious liberty must be interpreted so that both remain robustly protective and neither loses its significance. But here, petitioners urge this Court to accept an interpretation of religious liberty that will gut the meaningful guarantee of equality in the public sphere from this country's generally applicable civil rights laws. Under petitioners' interpretation, religious liberty will become a tool that opens the door to religious discrimination. Though a small group of religious adherents may benefit from such a regime, socially disadvantaged groups, including religious minorities—the very people who depend most on the protections of civil rights laws—will suffer the full brunt of the exemption with a loss of equal protection, equal opportunity, and personal dignity.

ARGUMENT

I. ANTIDISCRIMINATION LAWS ARE ESSENTIAL TO PROTECTING AGAINST RELIGIOUSLY MOTIVATED DISCRIMINATION.

Colorado prohibits discrimination "because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry" in a place of public accommodation. Colo. Rev. Stat. § 24-34-601(2)(a). The underlying premise of this anti-discrimination law is that arms' length marketplace transactions are commercial conduct subject to a wide range of public regulations, including laws prohibiting discrimination and laws relating to public health, fire safety, signage, noise levels, collection of sales taxes, and thousands of other matters that concern the public interest. When a business offers for sale to the public goods or services, this statute requires that *all* customers, regardless of their disability, race, creed, color, sex, sexual orientation, prior marital status, national origin, ancestry, or other protected identity characteristic—including atheist couples, interfaith couples, interracial couples, cohabitating couples, formerly-divorced couples, and same-sex couples—must be served on terms and conditions that do not take their identity into account.

Prohibitions against religion-based discrimination play a key role in the protection of twin bedrock values that underlie both the U.S. Constitution and American democracy: that the government has a responsibility to avoid entangling itself in religion while also protecting the value of pluralism, particularly religious pluralism, in American civil society.

Thus, secular public rules are secured by the First Amendment's Establishment Clause, and the independent value of religious pluralism is secured by the First Amendment's Free Exercise Clause. Nondiscrimination principles advance both values: they assure that the state does not takes sides when it comes to religion, favoring one religious tradition over another;[2] and they promote religious pluralism by prohibiting religion-based discrimination by private actors in significant sectors of civil society such as employment, housing, and public accommodations.

Importantly, the Court's most significant early free exercise cases drew a connection between the protection of religious liberty and principles of nondiscrimination. In *Sherbert v. Verner*, for instance, the Court grounded a new constitutional standard of review for religious liberty claims asserted by religious minorities in the standard of review honed in Fourteenth Amendment equal protection cases.[3] Even as the Court has adjusted the standard of

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[2] *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities.").

[3] *Id.* at 403 ("If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate * * *.'"

review in constitutional free exercise cases,[4] it has not abandoned the core equality principle that animated its early free exercise jurisprudence. The Court has retained strict scrutiny for government action that is non-neutral with respect to particular religious beliefs—a "nonpersecution principle." [5] Furthermore, statutes that protect religious practitioners, such as Title VII of the Civil Rights Act, often blend religious liberty and non-discrimination principles by guaranteeing religious accommodations that allow practitioners to participate in the public sphere.

As such, our constitutional commitment to religious liberty has always entailed a corollary commitment to non-discrimination. Indeed, the integrity of the former has always relied upon the enforcement of the latter. Petitioners' position amounts to nothing less than a partial—albeit significant—repeal of the anti-discrimination protections contained in state, federal, and locals laws that are integral, if not essential, to the free exercise of religion.

In enacting the types of statutes at issue herein, Colorado and other states sought to outlaw discrimination against protected classes. Naturally, these statutes include protections against the sort of religiously motivated discrimination that has long plagued this country. Indeed, the fight against religiously motivated discrimination dates back as least as early as the first meeting of Europeans in

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[4] *Emp't Div. v. Smith*, 494 U.S 872 (1990).

[5] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

present-day America, more than fifty years before the voyage of the Mayflower, when a group of Spanish citizens massacred a colony of French Protestants seeking religious freedom because the colonists were "scattering the odious Lutheran doctrine in these Provinces." Kenneth C. Davis, *America's True History of Religious Tolerance*, Smithsonian Mag. (2010).[6] Soon thereafter, the Puritans who arrived in Massachusetts Bay to escape their own religious persecution, founded "a theocracy that brooked no dissent, religious or political." *Id.* Catholics and other non-Puritans were banned from the colonies, and between 1659 and 1661, four Quakers were hanged in Boston because they stood up for their beliefs. *Id.* In New York, Catholics were constitutionally barred from public office. *Id.* And while Maryland granted Catholics full civil rights, it did not extend those same rights to Jews. *Id.*

Today, the United States is more heterogeneous religiously and racially than at any point in our history. *See* Pew Research Ctr., *America's Changing Religious Landscape* (2015).[7] Maintaining such a heterogeneous society depends upon the crucial role played by federal and state civil rights laws that prohibit discrimination in places of public accommodation. *See, e.g.*, 42 U.S.C. §§ 2000a, 2000e *et seq.*; Colo. Rev. Stat. § 24-34-601 *et seq.*; N.M.S.A. § 28-1-1 *et seq.*; N.Y. Exec. L. § 292. In fact, as of July 2016, forty-five states have enacted public accommodation

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[6] Available at https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/.

[7] Available at http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

laws that, *inter alia,* protect against religious discrimination.[8] Without such protections, individuals or groups who are outside the mainstream would not be able to fully participate in civil society, and would be vulnerable to targeting and discrimination at every turn.

States such as Colorado have incorporated strong anti-discrimination or anti-persecution principles into laws that protect religious liberty and plurality. The Colorado Constitution protects religious free exercise in terms that expressly conjoin religious liberty and non-discrimination: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion".[9] At the same time, Colorado has been a leader in enacting anti-discrimination laws that include religion as a protected class. "[F]or well over 100 years, Colorado has prohibited discrimination by businesses that offer goods and services to the public." Pet. App. 68a. Colorado also outlawed employment discrimination seven years before the federal government enacted the Civil Rights Act. *See* Colo. Rev. Stat. § 80-24-6 (1957).[10]

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[8] Nat'l Conference of State Legislatures, *State Public Accommodation Laws* (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

[9] Colo. Const. Art. II, § 4.

[10] The Colorado Anti-Discrimination Act (CADA) was revised and reenacted in 1979, under Colo. Rev. Stat. § 24-34-301 *et seq.*

This constitutional and statutory scheme reflects a well-reasoned relationship of religious liberty to religious equality, instructing that these two fundamental rights must be interpreted in ways that protect both values simultaneously. In all cases, but particularly in hard cases, the right to free exercise should be interpreted in terms that are equality-preserving, rather than equality-denying. Petitioners' position, however, urges just the opposite: an interpretation of religious liberty rights that radically undermines fundamental principles of equal access and mutual respect. These equality principles, of course, have value independent of our national and constitutional commitment to religious liberty. But in this context, liberty and equality are mutually reinforcing norms, each weakened if we unnecessarily place them at odds and are forced to choose between them.

II. EXEMPTING PETITIONERS FROM COLORADO'S GENERALLY APPLICABLE CIVIL RIGHTS LAW WOULD HARM THE CAUSE OF RELIGIOUS LIBERTY.

A. The Protection of Religious Liberty Depends Upon A Proper Balance Between Religious, Speech, And Equality Rights.

Petitioners herein take the position that their rights to religious liberty and free speech necessarily override (i) the state of Colorado's right to enforce its anti-discrimination law, and (ii) the rights of persons protected under that law. With this framing, petitioners claim to set up an unavoidable conflict between religious liberty and the equality rights of LGBTQ individuals, and they ask this Court to favor their religious liberty rights over the equality rights

of Coloradans. This is a false dichotomy. Petitioners' reading of the speech and religion clauses of the First Amendment would actually undermine protections for religious liberty, opening the door to discrimination against religious minorities exercising their faith. Furthermore, it leaves LGBTQ people of faith vulnerable to dual discrimination.

The values of religious liberty and equality can, and must, be harmonized. Religious liberty rights should be interpreted in equality-enhancing, not equality-denying, ways. When courts aim to protect religious liberty and equality together, they are able to strike a balance that does not subjugate one right to the absolute claim of the other. *See, e.g.*, *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 476 (7th Cir. 2001) (no absolute right to say "Have a Blessed Day" to clients who voice an objection to the phrase); *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1342 (8th Cir. 1995) (no absolute right to wear a graphic and religiously-motivated anti-abortion button in an office where it upset coworkers); *see also United States v. Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

Where petitioners claim that their religious beliefs entitle them to refuse service to certain individuals based on their identity, petitioners inherently argue that their religious rights should subjugate the equality rights of others. This argument contravenes the long-standing principle that the Free Exercise

Clause does not allow religious believers engaged in activities open to the public to thwart generally applicable anti-discrimination laws. The lower courts have faithfully applied that precedent for decades.[11] There is a basic reason to continue to adhere to that balancing: protections for religious liberty, particularly for religious minorities, depend on the rigorous enforcement of non-discrimination policies.[12]

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[11] *See, e.g.*, *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 61 (E.D. Pa. 1991) (hospital's free exercise rights were "not implicated" by federal prohibitions on age discrimination); *U.S. Dep't of Labor v. Shenandoah Baptist Church*, 707 F. Supp. 1450, 1460 (W.D. Va. 1989) (religious school's Free Exercise rights did not excuse it from violating Fair Labor Standards Act when it discriminated against employees on basis of sex); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 37, 39 (D.C. 1987) (en banc) (Georgetown University's free exercise rights did not excuse it from violating the D.C. Human Rights Act when it denied tangible benefits to student groups on basis of sexual orientation); *State ex rel. McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 853 n.16 (Minn. 1985) (Free Exercise Clause does not permit private health clubs to apply membership criteria based on marital status and religious affiliation in violation of Minnesota Human Rights Law).

[12] Stated another way: "Religious liberty was never intended to give one religion dominion over other religions, or a veto power over the civil rights and civil liberties of others." U.S. Comm'n on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties* 29 (2016).

B. Civil Rights Laws Are Protective Of—And Necessary To—Ensuring Religious Liberty For Religious Minorities.

Petitioners' claim that they may use a religious or free speech justification for avoiding compliance with the state's anti-discrimination law amounts to a partial repeal of the Colorado Anti-Discrimination Act. Recognizing a religious exemption that would otherwise be treated unequivocally as discrimination would have disastrous consequences for all civil rights laws. The harm to religious freedom that would result—particularly for members of minority religions—would be severe.

Accepting petitioners' claim that they may use a religious or free speech justification to avoid compliance with anti-discrimination law would jeopardize the rights of members of minority faiths. The owner of a clothing store could be allowed to refuse to sell clothing or scarves to religious believers who embrace modesty values, including observant Muslim and Jewish women, because the owner believes that by selling these items he would be supporting the customers' beliefs. Similarly, a store or restaurant owner could refuse service to a wide range of customers on the belief that engaging in a commercial transaction with someone of another religion would amount to affirming or supporting their faith.[13]

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[13] *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 846 (E.D. Mich. 2016) (in response to a wrongful termination claim, a funeral home that fired a transgendered employee raised affirmative defenses grounded in its sincerely-held religious beliefs.).

An exemption as far-reaching as the one urged by petitioners would not necessarily be limited to the public accommodations context. Employers, too, could argue that they are engaged in expression protected by the First Amendment when they make hiring decision. Title VII of the Civil Rights Act (Title VII) prohibits discrimination by non-religious organizations against applicants and employees because of their religion. *See* 42 U.S.C § 2000e-2(a)(1). In *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015), this Court recognized that Title VII's religious protections "affirmatively obligat[e]" employers to accommodate an applicant or employee's religion. Under petitioners' proposed religious opt-out, a clothing store could prevail by asserting that its owner believes the store's clothing serves as an expression of belief in the owner's Christian faith;[14] thus, it would be against its religion to allow someone who appears to be Muslim (or Jewish or Sikh) to sell that clothing. Further, an employer could refuse to hire a Jewish applicant because she believes that Jews murdered Jesus; an employer who is an anti-iconist Christian could fire a Catholic or Orthodox Christian employee who wears a crucifix necklace; and an employer could refuse to hire people who adhere to polytheistic, nontheistic, or humanist faith traditions, favoring

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[14] Several high-profile, multi-million dollar clothing empires operate under such a model. For example, Forever 21, a retailer of teen clothing much like Abercrombie, champions Christian designers and imprints John 3:16 on its bags. Laura Leonard, *Faith, Fashion, and Forever 21*, Christianity Today (Mar. 27, 2009), http://www.christianitytoday.com/women/2009/march/faith-fashion-and-forever-21.html.

only those who are adherents of monotheistic religions.

Petitioners' position would permit a Christian employer to engage in otherwise discriminatory actions against an employee who follows the tenets of Native American spirituality. The Eighth Circuit considered this scenario in *Campos v. City of Blue Springs, Mo.*, 289 F.3d 546 (8th Cir. 2002). The employee, a follower of Native American spiritual beliefs, was constructively discharged by her Christian boss, who excluded her from meetings, "told her she was not a good role model and that she needed to find a good Christian boyfriend to teach her to be submissive," and refused to provide her a raise because being a "good Christian" means learning to "give up the things [people] need most." *Id.* at 549-550. Petitioners' proposal would embolden employers to assert that their personal religious beliefs mandate that their employees believe in and "use the scripture" in doing their jobs. *Id.* at 549.

Similarly, a ruling by the Court that accepts petitioners' broad interpretation of the scope of free exercise and expression rights under the First Amendment could apply in the context of housing as well. The Fair Housing Act includes protections against religious discrimination. 42 U.S.C. § 3604. But if that generally applicable prohibition does not apply in the face of a religious objection, a condominium association could prohibit a Jewish family from affixing a mezuzah to their door, or a sukkah in their back yard. *Bloch v. Frischholz*, 587 F.3d 771, 772 (7th Cir. 2009) (en banc). And a city whose population primarily identifies with one faith could deny housing, police protection, and access to public

spaces to those who do not share identical religious beliefs. *United States v. Town of Colorado City, Ariz.*, No. 3:12-cv-08123 (D. Ariz. 2016).

Petitioners are inviting the Court to upend our nation's efforts to ensure that a secular public sphere is available for all religious adherents, and that religious pluralism should be fostered in civil society. The Court should decline that invitation.

III. PETITIONERS' INTERPRETATION OF RELIGIOUS LIBERTY ESPECIALLY THREATENS THE FREE EXERCISE RIGHTS OF MEMBERS OF MINORITY RELIGIONS.

A. Allowing Religious Beliefs Of Business Owners To Override Civil Rights Laws Would Disproportionately Affect Religious Minorities.

The Court's jurisprudence linking free exercise rights to equality rights is justified in significant part by the fact that religious minorities tend to be disproportionately represented in the class of claimants suffering religion-based discrimination. Without robust protections against religion-based discrimination, adherents of minority religions will be chilled in exercising the tenets of their faith for fear of experiencing bias in public accommodations, employment, housing, and in other sectors of public and private life.

For this reason, courts have recognized a limit to the scope of religious liberty claims where those claims significantly undermine equality values. Following the Civil War, some individuals argued that "it was a matter of *religious liberty* for devout

southern whites (and many blacks) to remain separate from members of the other race." William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates, Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657, 670 (2011). And at the height of the civil rights movement in the 1960s, politicians quoted Genesis and Leviticus to oppose civil rights laws. *See, e.g.*, 110 Cong. Rec. 13,206-08 (1964); *cf. Loving v. Virginia*, 388 U.S. 1, 3 (1967) ("Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents.") (citing, and rejecting, trial court opinion); *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) (refusing "to lend credence or support to [a restaurant owner's position] that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."), aff'd in relevant part and rev'd in part on other grounds, 377 F.2d 433 (4th Cir. 1967), aff'd and modified on other grounds, 390 U.S. 400 (1968).

While constitutional and statutory protections against religious discrimination apply to all faiths equally, religious minorities have been the primary beneficiary of these laws, largely because religious minorities experience a disproportionately high level of faith-based discrimination. One recent report from the U.S. Department of Justice sampled cases involving religious discrimination in employment, and of the six cases profiled, each involved a member of a minority religion. *See* U.S. Dep't of Justice, Civil Rights Div., *Combating Religious Discrimination*

and Protecting Religious Freedom (Aug. 6, 2015).[15] The Department of Justice also consistently reports a disproportionately high number of discriminatory incidents against Muslims and Jews in particular. See U.S. Dep't of Justice, *Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010-2016*, at 4 (2016).[16]

Overall, during the past decade, claims of religiously motivated discrimination have risen dramatically. The most recent FBI statistics on hate crimes for the year 2015 revealed that religious bias accounted for 21.4 percent of single-bias incidents, second only to race and ethnicity bias, and accounted for more hate crimes than sexual-orientation bias. *See* FBI, Uniform Crime Reporting Program, *2015 Hate Crime Statistics* (2016).[17] The Southern Poverty Law Center has also reported a significant rise in hate groups and hate crimes, including a 197 percent increase in

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[15] Available at https://www.justice.gov/crt/combating-religious-discrimination-and-protecting-religious-freedom-16.

[16] "[M]inority groups have faced a disproportionate level of discrimination in zoning matters, reflected in the disproportionate number of suits and investigations involving minority groups undertaken by the Department. In particular, the percentage of Department RLUIPA investigations involving mosques or Islamic schools has risen dramatically in the time since the Tenth Anniversary Report was issued—from 15% in the 2000 to August 2010 period to 38% during the period from September 2010 to the present. Investigations involving Jewish institutions remain disproportionate to the percentage of the overall U.S. population that is Jewish." Available at https://www.justice.gov/crt/file/877931/download.

[17] Available at https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf.

specifically anti-Muslim hate groups. *See* Mark Potok, So. Poverty Law Ctr., *The Year In Hate and Extremism* (2017).[18] And over the past year, sixty percent of American Muslims have reported some level of religious discrimination; in fact, Muslims are the religious group most likely to experience religious discrimination. *See* Inst. for Soc. Pol'y & Understanding, *American Muslim Poll 2017: Muslims at the Crossroads* 4 (2017);[19] *see also* Council on Am. Islamic Relations (CAIR), *Civil Rights Report 2017: The Empowerment of Hate* (2017).[20]

Members of minority faiths are particularly reliant on anti-discrimination laws to avoid being marginalized within the public sphere and to protect their right to exercise their faith. For example, over twenty percent of the Equal Employment Opportunity Commission's (EEOC) charges of religious discrimination in 2015 related to Muslims,[21] yet only one percent of the U.S. population is Muslim.[22] In addition, members of minority religions face increased

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[18] Available at https://www.splcenter.org/fighting-hate/intelligence-report/2017/year-hate-and-extremism.

[19] Available at https://www.ispu.org/?smd_process_download=1&download_id=22521.

[20] Available at http://www.islamophobia.org/reports/188-the-empowerment-of-hate.html.

[21] EEOC, *Charges Filed on the Basis of Religion - Muslim or National Origin - Middle Eastern FY 1995 - FY 2015*. Available at https://www.eeoc.gov/eeoc/statistics/enforcement/religion_muslim_origin_middle_eastern.cfm.

[22] Besheer Mohamed, Pew Research Ctr., *A new estimate of the U.S. Muslim population* (2016), http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/.

rates of bullying and harassment in educational institutions, discrimination in hiring and on the job, lack of religious accommodations, and violence and criminal threats at their places of worship. *See* U.S. Dep't of Justice, *Combating Religious Discrimination Today: Final Report* 12 (July 2016).[23] Civil rights laws like Colorado's ensure that everyone, irrespective of their faith tradition, sexuality, or the color of their skin, can access places of public accommodation without facing discrimination.

B. The Court Should Not Accept Petitioners' Efforts To Minimize The Harms Caused By A Religious Or Free Speech Justification For Avoiding Compliance With Colorado's Anti-Discrimination Law.

Petitioners argue that "some dignitary harms must be tolerated in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." Pet. Br. 53 (citation omitted). Petitioners further argue that the dignitary harm suffered by the couple in this case is less compelling because support for same-sex marriage is at an all-time high and many bakeries would sell the couple a cake. *Id.* at 54. Following this logic, so long as customers refused service because of their identity can find an alternative provider, there is no harm. That has never been the test or the law.

Under this argument, store keepers could post signs saying "White Customers Only," "Christian Customers Only," or "Saved Customers Only," and so

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[23] Available at https://www.justice.gov/crt/file/877936/download.

long as there was a store that provided the same service to non-white customers, non-Christian customers, or customers who ha e not accepted Jesus Christ as their savior, there would be sufficient "breathing space" for the freedoms protected by a theology of otherwise discriminatory segregation.

Petitioners are wrong to minimize the dignitary harms inflicted by a refusal of service to persons who are protected by anti-discrimination law. The detrimental effects are well documented and far-reaching. *See, e.g.*, Emma K. Adam et al., *Developmental histories of perceived racial discrimination and diurnal cortisol profiles in adulthood: A 20-year prospective study*, 62 Psychoneuroendocrinology 279 (2015); Kathryn Anderson, *Diagnosing Discrimination: Stress from Perceived Racism and the Mental and Physical Health Effects*, 83 Soc. Inquiry 55 (2013); Kevin Nadal et al., *A Qualitative Approach to Intersectional Microaggressions: Understanding Influences of Race, Ethnicity, Gender, Sexuality, and Religion*, 2 Qualitative Psych. 147 (2015); Lance Laird et al., *Muslim patients and health disparities in the UK and the US.*, 92 Archives of Disease in Childhood 922 (2007). Ignoring these harms contravenes decades of civil rights law and jurisprudence providing for the protection of minorities from discrimination in public spaces.

Petitioners' argument also assumes that customers refused service on account of a business owner's religious beliefs have an opportunity to obtain services on a separate, yet equal basis. This is not always the case. Persons with "Arab-sounding" names face greater difficulties than those with "white-sounding" names in obtaining access to a wide

range of public accommodations, and people who are known to be Muslim face systematic discrimination in access to businesses and social services. For instance, a Muslim woman was kicked out of a religious homeless shelter after a member of the staff told the woman that she did not like Muslims, and a Muslim woman trying to complete a transaction at a bank was told by the bank's security guard that she had to remove her religious head covering (*hijab*), even though the woman tried to explain that the head covering was worn for religious purposes.[24] These difficulties are exacerbated in rural and homogenous areas, where being turned away from one store, school, or employer may mean being unable to find any alternative at all. Given the increase in the homogeneity of our communities, this raises serious concerns. A 2017 fair housing report suggests that racial and ethnic disparities in access to credit, combined with growing discrimination and the effects of the financial crisis, have "perpetuated racial segregation."[25] Nat'l Fair Housing All., *The Case for Fair Housing: 2017 Fair Housing Trends Report* 6 (2017). As a result, allowing for a partial repeal of anti-discrimination laws in the name of "religious liberty" could severely limit how "public" our places of public accommodation actually are.

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[24] CAIR-Chicago, *Civil Rights Case Digest*, http://www.cairchicago.org/civil-rights-case-digest/. *See also* Samantha Friedman et al., *Religion, Housing Discrimination, and Residential Attainment in Philadelphia: Are Muslims Disadvantaged?* 1 (2015), https://paa.confex.com/paa/2016/mediafile/ExtendedAbstract/Paper8129/friedman.gibbons.wynn.PAA16.pdf.

[25] Available at http://nationalfairhousing.org/wp-content/uploads/2017/07/TRENDS-REPORT-2017-FINAL.pdf.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Court of Appeals should be affirmed.

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October 30, 2017